UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. PAYTON,

               Petitioner,   No. 10-CV-15011

vs.   Hon. Gerald E. Rosen

MITCHELL PERRY,

               Respondent.

_____/

ORDER DENYING PETITIONER'S MOTION TO
HOLD HABEAS PETITION IN ABEYANCE, ADOPTING
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION,
AND DISMISSING PETITIONER'S HABEAS CORPUS ACTION

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on   August 31, 2011

PRESENT: Honorable Gerald E. Rosen
                     United States District Chief Judge

This matter is presently before the Court on the July 22, 2011 Report and

Recommendation of United States Magistrate Judge Paul J. Komives recommending that

the Court deny Petitioner's Motion for Equitable Tolling; grant, in part, Respondent's

Motion for Summary Judgment regarding the applicability of § 2244(d)'s one-year

statute of limitations to the claims raised by Petitioner; and deny Petitioner's one timely

claim on the merits. Petitioner filed Objections to the Report and Recommendation on

August 10, 2011. Then, on August 24, 2011, Petitioner filed a "Motion to Hold Habeas

Petition in Abeyance" in which he requested that, if the Court were inclined to dismiss

his habeas action for failure to exhaust his state remedies, that the Court refrain from doing so at this time and instead, hold his petition in abeyance to allow him to exhaust all of his claims in state court. Having reviewed the record, the Court rules as follows.

Addressing first Petitioner's Motion to Hold Habeas Petition in Abeyance, the Court finds that Plaintiff has exhausted all of his state remedies with respect to all of the claims raised in his habeas petition. Indeed, failure to exhaust was not argued by Respondent. Respondent argued only that Petitioner's claims are barred by the one-year statute of limitations set forth in § 2244(d). Nor did the Magistrate Judge raise failure to exhaust in his R&R. Having reviewed the record independently, the Court finds no failure to exhaust issue. Therefore, there is no reason hold this petition in abeyance. Accordingly, Petitioner's Motion Hold Habeas Petition in Abeyance will be denied.

Turning to the Magistrate Judge's Report and Recommendation, the Court has reviewed and considered the Report and Recommendation, Petitioner's Objections thereto, and the Court's entire record of this matter, and based upon this review, concludes that, for the reasons stated in the Report and Recommendation, Petitioner Payton's petition for habeas corpus relief should be denied, and this habeas action should, accordingly be dismissed.

For the foregoing reasons,

NOW, THEREFORE,

IT IS HEREBY ORDERED that Petitioner's Motion to Hold Habeas Petition in Abeyance **[Dkt. # 19]** is DENIED.

IT IS FURTHER ORDERED that the Magistrate Judge's Report and

Recommendation of July 22, 2011 **[Dkt. # 16]** be, and hereby is, adopted by this Court.

IT IS FURTHER ORDERED that, for the reasons set forth in the Magistrate

Judge's Report and Recommendation, Petitioner's Motion for Equitable Tolling **[Dkt. #**

2] is DENIED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment

[Dkt. # 11] is granted, in part.

IT IS FURTHER ORDERED that Plaintiff's petition for habeas corpus relief **Dkt.**

 # 1] be, and hereby is DENIED and the above-captioned case, therefore, is DISMISSED

in its entirety.

IT IS FURTHER ORDERED that for the reasons stated in the Report and

Recommendation, the Court concludes that Petitioner has not made a substantial showing

of the denial of a constitutional right. Accordingly, the Court declines to issue a

certificate of appealability or grant leave to proceed on appeal *in forma pauperis*. *See*

Fed. R. App. Pro. 24(a).

                                   s/Gerald E. Rosen
                                   Chief Judge, United States District Court

Dated: August 31, 2011

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 31, 2011, by electronic mail and upon Charles E. Payton, #571203, Newberry Correctional Facility, 3001 Newberry Avenue, Newberry, MI 49868 by ordinary mail.

s/Ruth A. Gunther
Case Manager